

1 Because the prior habeas corpus petition was decided on the merits, the instant habeas petition is a
2 successive petition. *McNabb v. Yates*, 576 F.3d 1028, 1029 (9th Cir. 2009).

3 On April 15, 2013, the court issued an order in the instant case directing that petitioner present
4 this court with proof that he has actually obtained leave to file a successive petition from the Ninth
5 Circuit Court of Appeals (ECF #7). Petitioner filed a response to the order (ECF #8) and an affidavit
6 (ECF #9) on May 13, 2013. However, petitioner merely argues again that he has not filed a new federal
7 habeas petition but a motion for relief from judgment pursuant to Rule 60(b)(4) (*see* ECF #7). As the
8 court explained in its previous order, because petitioner clearly seeks to challenge—again—the legality of
9 his custody, his sole federal remedy is a writ of habeas corpus. *Preiser v. Rodriguez*, 411 U.S. 475
10 (1973); *Young v. Kenny*, 907 F.2d 874 (9th Cir. 1990). The court has properly construed this action as
11 a petition for a writ of habeas corpus. Petitioner has failed to present proof that he has obtained leave
12 to file a successive petition from the Ninth Circuit Court of Appeals, and therefore, the instant petition
13 will be dismissed as successive.

14 In order to proceed with any appeal, petitioner must receive a certificate of appealability. 28
15 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9th Cir. R. 22-1; *Allen v. Ornoski*, 435 F.3d 946, 950-951 (9th
16 Cir. 2006); *see also United States v. Mikels*, 236 F.3d 550, 551-52 (9th Cir. 2001). Generally, a petitioner
17 must make “a substantial showing of the denial of a constitutional right” to warrant a certificate of
18 appealability. *Id.*; 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). “The
19 petitioner must demonstrate that reasonable jurists would find the district court's assessment of the
20 constitutional claims debatable or wrong.” *Id.* (*quoting Slack*, 529 U.S. at 484). In order to meet this
21 threshold inquiry, the petitioner has the burden of demonstrating that the issues are debatable among
22 jurists of reason; that a court could resolve the issues differently; or that the questions are adequate to
23 deserve encouragement to proceed further. *Id.*

24 Pursuant to the December 1, 2009 amendment to Rule 11 of the Rules Governing Section 2254
25 and 2255 Cases, district courts are required to rule on the certificate of appealability in the order
26 disposing of a proceeding adversely to the petitioner or movant, rather than waiting for a notice of appeal
27 and request for certificate of appealability to be filed. Rule 11(a). This court has considered the issues
28 raised by petitioner, with respect to whether they satisfy the standard for issuance of a certificate of

1 appealability, and determines that none meet that standard. The court will therefore deny petitioner a
2 certificate of appealability.

3 **IT IS THEREFORE ORDERED** that this action is **DISMISSED** as a successive petition.

4 **IT IS FURTHER ORDERED** that petitioner is **DENIED A CERTIFICATE OF**
5 **APPEALABILITY.**

6 **IT IS FURTHER ORDERED** that the Clerk **SHALL ENTER JUDGMENT** accordingly and
7 close this case.

8 DATED this 24th day of June, 2013.



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11 LARRY R. HICKS
12 UNITED STATES DISTRICT JUDGE
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